

MAR 29 1984

ALEXANDER L. STEVENS.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

**AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.**

*Cross-Petitioners,*

v.

**CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.**

*Cross-Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

**CROSS-PETITION FOR A WRIT OF CERTIORARI**

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#### **STATEMENT REQUIRED BY RULE 28.1**

None of the cross-petitioners have any parent corporations, subsidiaries that are not wholly-owned, or affiliates.

**QUESTIONS PRESENTED**

For the reasons stated in their response to the petition, cross-petitioners respectfully submit that a writ of certiorari should not be granted. If, however, this Court grants the petition for a writ of certiorari, this cross-petition should be granted to put the following questions before the Court and thus to enable this Court to review the Seventh Circuit's decision fully and to reinstate the jury verdict:

1. Does the Rule of Reason require defendants to bear the burden of proof on any issue relevant to the competitive significance of the challenged conduct?
2. Does the Rule of Reason require that conduct be found to violate the Sherman Act unless it is both reasonable *and* the least restrictive alternative available to defendants?

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**OPINIONS BELOW**

The opinion of the Court of Appeals (Pet. App. 1-47) is reported at 719 F.2d 207 (7th Cir. 1983). The order of the Court of Appeals (Pet. App. 55) denying defendants' petition for rehearing with suggestion for rehearing in banc is unreported. The District Court's order entering judgment for defendants (Pet. App. 57) is also unreported.



## **JURISDICTION**

The judgment of the Court of Appeals was entered on September 19, 1983. Pet. App. 49. A timely petition for rehearing with suggestion for rehearing in banc filed by defendants was denied on December 1, 1983. Pet. App. 55. Plaintiffs filed a Petition for a Writ of Certiorari on February 28, 1984, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1). This cross-petition is filed pursuant to that statute and to Rules 19.5 and 20.5 of the Rules of this Court. The Petition for Certiorari was received by cross-petitioners on February 28, 1984.

## **STATUTE INVOLVED**

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states, or with foreign nations is declared to be illegal. . . ."

## **STATEMENT OF THE CASE**

Cross-petitioners incorporate by reference the Statement of the Case contained in their Response to the Petition for a Writ of Certiorari at pages 2-6.

## **REASONS FOR GRANTING THE WRIT**

In their response to the petition, respondents have explained why the petition should be denied. *See* Response to Petition for a Writ of Certiorari ("Response"). In essence, petitioners have sought interlocutory review of a decision granting them a new trial and have presented questions which may never have to be decided by this Court. The questions that they present, moreover, either raise issues decided favorably to them or involve application of well-settled law to the facts of the case. Thus, they present no issues of sufficient importance to justify interlocutory review.

If this Court grants the petition, however, a grant of this cross-petition is essential to enable the Court to review fully the Seventh Circuit's decision. Indeed, the questions presented by this cross-petition are intertwined with the first and second questions posed by the petition. Taken together, these questions raise the issue of what factors are relevant in applying the Rule of Reason and who bears the burden of persuasion on these factors.

In addition, a grant of this cross-petition is necessary to allow this Court to fashion appropriate relief. If this Court concludes that the Seventh Circuit erred in its treatment of the Rule of Reason and that the District Court properly instructed the jury, the appropriate relief would be to reinstate the judgment of the District Court. This cross-petition requests such relief.

## I

In vacating the jury verdict, the Seventh Circuit isolated certain factors relevant to the Rule of Reason for special treatment. By contrast, the District Court included all relevant factors in a single calculus. It instructed the jury to assess the overall competitive significance of the alleged restraint—taking into account the reasons for the challenged conduct and the effect of that conduct on competition between chiropractors and physicians and on competition among physicians. The District Court's instructions correctly stated the applicable law. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

In addition, the Seventh Circuit placed upon the respondents the burden of persuasion on certain issues directly relevant to the reasonableness of the challenged conduct. The District Court placed that burden on petitioners. The approach taken by the District Court correctly

reflects the precedent of this Court while the decision of the Seventh Circuit conflicts with it. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967) ("The burden of proof . . . remains with the plaintiffs" on all issues relating to the reasonableness or validity of conduct under the Sherman Act). *Accord, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 694 F.2d 1132, 1136 (9th Cir. 1982); *Betaseed, Inc. v. U and I, Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983).\*

## II

Finally, the Seventh Circuit held that ethical guidelines are invalid unless they are not only reasonable but also the means of achieving defendants' objectives that are the least restrictive of competition. This holding is contrary to precedent. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.29 (1977), this Court explicitly held that challenged conduct can satisfy the antitrust laws even though that conduct "was neither the least nor the most restrictive provision" available. *See also Chicago Board of Trade, supra*, 246 U.S. at 238. *Accord, American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3d Cir. 1975); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603

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\* The Seventh Circuit also held that the District Court had abused its discretion by permitting respondents to introduce certain evidence. Pet. App. 43-44. However, the Seventh Circuit's holding on this issue rests on the same erroneous premise as the holding on the instructions, and admission of this evidence was an appropriate exercise of the District Court's discretion. Further, the Seventh Circuit erroneously held that there was sufficient evidence to extend liability to some of the respondents on the theory that their agents had acted with apparent authority to engage in standard setting activities and that the trial court's agency instructions were inadequate. Pet. App. 43. But once it is acknowledged that an adequately instructed jury found that Principle 3 and respondents' alleged implementing conduct did not violate the Sherman Act and that none of the evidentiary rulings constituted reversible error, then any deficiency in the apparent authority instructions is plainly harmless error.

F.2d 263, 303 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Foster v. Maryland State Savings & Loan*, 590 F.2d 928, 934-35 (D.C. Cir. 1979), *cert. denied*, 439 U.S. 1071 (1980). In instructing the jury to consider whether respondents' conduct was reasonably necessary to achieve their purposes, the District Court correctly stated the law.

### CONCLUSION

For the reasons stated, if the Court grants the petition for a writ of certiorari, this cross-petition should be granted so that this Court may fully address the Seventh Circuit's decision and reinstate the jury verdict.

Respectfully submitted,

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